**Section 511 is Not a Step Forward**

Prepared for the National Federation of the Blind

By Samuel R. Bagenstos[[1]](#footnote-1)\*

The Workforce Investment Act of 2013, which the Committee on Health, Education, Labor, and Pensions recently reported to the full Senate, contains a provision that purports to restrict subminimum wage employment for young adults with disabilities. That provision is the proposed Section 511 of the Rehabilitation Act. Although Section 511 is well intended, it is unlikely to achieve its goals. If anything, it is likely to set back the progress that the federal government has made in recent years in limiting the use of subminimum wage employment in sheltered workshops.

The good intentions behind Section 511 cannot be doubted. Senator Harkin, who has championed the provision, has argued passionately that “[w]ithout section 511 in the bill, I am very concerned that another generation of young people with significant disabilities will end up getting tracked directly from school to sheltered settings.”[[2]](#footnote-2) Legislative efforts to restrict the use of subminimum wages and sheltered work are long overdue.[[3]](#footnote-3) Senator Harkin and the others who drafted this provision are to be commended for attempting to do something about the problem in the context of the reauthorization of the Workforce Investment Act.

With respect, however, Section 511 is unlikely to have much, if any, effect in stopping young people with disabilities from being tracked into sheltered workshops. Even worse, the provision is likely to slow the progress the Department of Justice has recently made in this area under the Americans with Disabilities Act. Section 511 is thus a well-intentioned, but ultimately misguided, effort to respond to the needless shunting of people with disabilities into sheltered work at below-minimum wage. The remainder of this paper discusses these points.

***The Subminimum Wages Section 511 Does Not Limit***

Section 511 is framed as a measure to prevent a new generation of young people from entering sheltered work at below-minimum wages. As a result, it does absolutely nothing to limit the use of subminimum wages for people who are already receiving them as of the date the provision comes into effect or for people who are over age 24 when they begin below-minimum-wage work.[[4]](#footnote-4) This means that the young people who already have been sent off to sheltered workshops and subminimum wage jobs—like the young people in Rhode Island who were the subject of the recent Department of Justice agreement with the state and the City of Providence[[5]](#footnote-5)—will get absolutely no benefit from this provision, even if they are still under 24.

***The Weakness of the Limitations Section 511 Does Impose***

To be sure, there is a benefit to keeping a new generation of people with disabilities from being sent off to dead-end, below-minimum-wage jobs in sheltered workshops. If Section 511 really would accomplish that goal, it would be a step forward, even though it does nothing for people who are currently being unnecessarily relegated to sheltered work. But Section 511 will not accomplish that goal—not even close. Even as to people with disabilities who are 24 and under and who are not yet in subminimum wage jobs—the target of the provision—Section 511’s limitations on the use of the subminimum wage are full of loopholes. All of our experience with the subminimum wage suggests that vocational rehabilitation systems and sheltered workshops will exploit these loopholes to the greatest extent possible.

 For individuals who are 24 and under and who are not yet in subminimum wage jobs, Section 511 would allow an employer to pay a below-minimum wage to three classes of individuals: (1) individuals who have applied for vocational rehabilitation services, but have been found ineligible for them by the state vocational rehabilitation agency[[6]](#footnote-6); (2) individuals who have applied for and been found eligible for vocational rehabilitation services, but who have worked toward an integrated, competitive employment outcome “for a reasonable period of time without success”[[7]](#footnote-7); and (3) individuals who are “receiving work readiness or job training services provided by” a subminimum wage employer.[[8]](#footnote-8) Taken together, these three classes of individuals will likely encompass all or nearly all of the young adults with disabilities whom the section claims to prevent from being placed in subminimum-wage sheltered workshops.

 *(1) Those Found Ineligible for Vocational Rehabilitation Services.* Supporters of Section 511 argue that it creates a “speed bump” in the way of placing new young adults into subminimum wage jobs by requiring them to apply for vocational rehabilitation services before entering those jobs. As discussed below, Section 511 does *not* invariably require young adults to apply for vocational rehabilitation services before entering subminimum wage jobs. But even in those circumstances where it does, that requirement will not impose any meaningful obstacle to directing individuals to below-minimum-wage work.

Section 511 specifically allows subminimum wage jobs in cases where the state has found an individual ineligible for vocational rehabilitation services.[[9]](#footnote-9) But experience shows that state vocational rehabilitation systems often erroneously find individuals with disabilities ineligible for their services—and it is these erroneous determinations that lead to placement in subminimum wage jobs at sheltered workshops. In Oregon, for example, the Department of Justice found that the state’s vocational rehabilitation agency “often screens out [persons who are capable of benefiting from integrated employment] by classifying them as too severely disabled to benefit from employment services or succeed in a job setting,” and that “sheltered workshops often become the default setting” as a result.[[10]](#footnote-10) Nationwide, more than 40 percent of applicants for vocational rehabilitation who had their cases closed in 2011 were determined by their state vocational rehabilitation systems to be ineligible for employment services.[[11]](#footnote-11)

Section 511 does absolutely nothing to stop this transmission belt to sheltered work. The provision does include language that purports to require informed consent of the individual with a disability or his parent or guardian before placement in a subminimum wage job.[[12]](#footnote-12) But a similar informed-consent requirement exists in current law,[[13]](#footnote-13) and Section 511 adds nothing of substance to it. Indeed, it is hard to believe that an informed-consent requirement could do much to stop sheltered-workshop placement in these circumstances. If the individual (or his parent or guardian) refuses consent to sheltered workshop placement, Section 511 does *not* require the state to provide supported employment services in an integrated, competitive setting. For an individual whom the state has found ineligible for vocational rehabilitation services to refuse consent to placement in a sheltered workshop is thus to refuse consent to the *only* employment setting the state has offered. Even individuals who are fully capable of working in integrated jobs will likely consent to sheltered work if that is the only option available. By allowing subminimum wages in cases in which the state has found an individual ineligible for vocational rehabilitation services, Section 511 will entrench one of the major pathways by which young adults with disabilities are shunted into below-minimum-wage work.

*(2) Those Who Have Worked Toward an Integrated Employment Outcome “For a Reasonable Period of Time without Success.”* Section 511 also allows the payment of a subminimum wage in cases in which the state has found an individual eligible for vocational rehabilitation services, but he or she has worked toward an integrated, competitive employment outcome “for a reasonable period of time without success.”[[14]](#footnote-14) In such cases, Section 511 would allow the payment of a subminimum wage if “the individual’s vocational rehabilitation case is closed after the individual’s qualified vocational rehabilitation counselor and the individual both agree that continued efforts by the individual to work toward an employment outcome [in an integrated job in the competitive workforce] at the present time will likely not be successful.”[[15]](#footnote-15)  But this is hardly an effective obstacle to inappropriate placements in sheltered workshops. Just as states often erroneously find people with disabilities ineligible for vocational rehabilitation services, they also often close the cases of individuals whom they had originally found eligible based on the erroneous determination that those individuals cannot succeed in integrated employment.[[16]](#footnote-16)

Section 511 does virtually nothing to slow this second common pathway to below-minimum-wage jobs at sheltered workshops. Section 511 requires that an individual have worked towards integrated employment “for a reasonable time without success,” but it does not define—or even give any guidance for how to interpret—the crucial term “reasonable.” And the provision allows the use of a subminimum wage based on a prediction that further efforts at achieving integrated employment “will likely not be successful.” But the provision leaves the crucial concept of “likel[ihood]” undefined and effectively unenforceable.

*(3) Individuals Receiving Job Training Services.* Section 511 also allows the payment of a subminimum wage to individuals who are “receiving work readiness or job training services provided by a certificate holder, as part of the individual’s preparation for competitive integrated employment.”[[17]](#footnote-17) Pursuant to this training-services subsection, an individual can receive a subminimum wage for up to six months without any further limitation,[[18]](#footnote-18) or for a longer period if “the individual wishes to continue to receive such services” and is reassessed every six months “to determine the individual’s ability to transition to competitive integrated employment.”[[19]](#footnote-19)

To the extent that the remainder of Section 511 imposes *any* meaningful restrictions on the use of subminimum wage jobs—which is doubtful—the training-services subsection provides a loophole that allows those restrictions to be entirely evaded. The subminimum wage for people with disabilities has often been justified as providing opportunities for training. But experience shows that below-minimum-wage jobs provide little meaningful training; they instead largely prepare people with disabilities for a life of segregated, dead-end work.

Up to 95 percent of workers with disabilities receive less than the minimum wage work in sheltered workshops.[[20]](#footnote-20) And “[t]he ineffectiveness of sheltered workshops for helping individuals progress to competitive employment is well established.”[[21]](#footnote-21) Rather, “[s]heltered employment has been shown to be a much better medium for preparing people to continue sheltered work than to begin competitive work.”[[22]](#footnote-22) In its recent Rhode Island investigation, for example, the Department of Justice found that requiring high school students to receive training in a sheltered workshop placed them at “serious risk of unnecessary segregation” in sheltered workshops later in life, because students in the sheltered workshop “generally only learn work tasks that will prepare them for postsecondary placements in segregated work settings.”[[23]](#footnote-23)

Section 511 does absolutely nothing to stop this common pathway to lifetime workplace segregation for people with disabilities. To the contrary, the proposed provision specifically endorses the use of subminimum wage jobs as a means of providing training—and it does so regardless of the age of the individual with a disability, regardless of whether he or she currently receives a subminimum wage, and regardless of whether he or she has applied for vocational rehabilitation services.[[24]](#footnote-24) In other words, all of the limitations imposed by the other subsections of Section 511—to the extent that they are at all meaningful—do not exist under the subsection that allows a subminimum wage for those who receive work readiness or job training services. The only limitation imposed by this subsection is the requirement of an assessment every six months of the individual’s ability to move toward competitive employment. But precisely because sheltered workshops provide so little training that aids success in competitive employment, it is unlikely to be much of a limitation at all.

***Section 511 Undermines Recent Department of Justice Efforts***

 The Department of Justice has repeatedly made clear that sheltered work at subminimum wages presumptively violates the integration mandate of the Americans with Disabilities Act as interpreted in the Supreme Court’s landmark case of *Olmstead v. L.C.*[[25]](#footnote-25)  The Department’s technical assistance guide on *Olmstead* specifically lists “individuals spending their days in sheltered workshops” as an example of the unnecessary segregation of people with disabilities.[[26]](#footnote-26) The Department recently sued the State of Oregon to challenge the state’s provision of employment services to people with disabilities through sheltered workshops,[[27]](#footnote-27) and it entered into an interim settlement with the State of Rhode Island and the City of Providence regarding the same issue.[[28]](#footnote-28)

The Rhode Island settlement in particular rests on the proposition that every young person with a disability should receive training and supports in an integrated work setting.[[29]](#footnote-29)  Section 511, unfortunately, would mark a step backward from that proposition. Section 511 would affirmatively embrace subminimum wage employment (which typically takes place in a sheltered workshop) for people under 24—at least under the very broad circumstances in which the state vocational rehabilitation system says that no integrated employment outcome is possible or the sheltered workshop purports to be providing training services. That position stands in sharp contrast to the recent positions of the Department of Justice.

***Conclusion***

Section 511 reflects a good-faith effort at reaching a compromise that will limit subminimum wage employment. But despite the good intentions of its author, Section 511 is exceedingly unlikely to achieve that result.

It is unclear whether any compromise that would write the recognition of the subminimum wage into the Rehabilitation Act would make sense.  But at a minimum, any such compromise would have to do two things that Section 511 does not do: (a) prohibit any new issuance of certificates authorizing the payment of subminimum wages under the Fair Labor Standards Act; and (b) require that those who receive the subminimum wage work not in sheltered workshops, but in integrated, competitive environments.  The first requirement would serve Senator Harkin’s goal of preventing “another generation of young people with significant disabilities” from “end[ing] up getting tracked directly from school to sheltered settings.”  And the second would align the disability subminimum wage provision with the other subminimum wage provisions in the Fair Labor Standards Act for learners, apprentices, and students by ensuring that subminimum wages are truly only a temporary way station for people who are in fact learning skills appropriate to the competitive economy—rather than a long-term subsidy to dead-end sheltered workshops.  Section 511 as currently drafted does neither of these things.  It simply entrenches sheltered workshops and the subminimum wage—and for the first time recognizes them as acceptable under the rights provisions of the Rehabilitation Act, our Nation's first disability rights law.  This is a stunning step backwards.

1. \* Professor of Law, University of Michigan Law School. Former Principal Deputy Assistant Attorney General for Civil Rights, United States Department of Justice. Institutional affiliation for identification purposes only. [↑](#footnote-ref-1)
2. See Michelle Diament, *Subminimum Wage Plan Divides Disability Advocates*, Disability Scoop, July 30, 2013, available at <http://www.disabilityscoop.com/2013/07/30/subminimum-wage-divides/18409/>. [↑](#footnote-ref-2)
3. See *The Case Against the Section 14(c) Subminimum Wage Program*, available at http://nfb.org/images/nfb/documents/word/14c\_report\_sam\_bagenstos.doc‎. [↑](#footnote-ref-3)
4. See § 511(a)(1) (allowing subminimum wage if “[t]he individual is currently employed, as of the effective date of this section, by an entity that holds a valid certificate pursuant to section 14(c) of the Fair Labor Standards Act”), (a)(2) (allowing subminimum wage if “[t]he individual is older than age 24 on the date when the individual begins employment at a subminimum wage”). [↑](#footnote-ref-4)
5. See Letter from Thomas E. Perez, Assistant Attorney General, to Mary Ann Carroll, Esq., June 7, 2013 (describing DOJ’s findings that young people with disabilities often went directly, on turning 21, from a sheltered workshop operated by the Providence schools to a sheltered workshop operated by a state contractor that paid below-minimum wages); Interim Settlement Agreement, United States v. Rhode Island, No. 1:13-cv-00442, (D.R.I., filed June 13, 2013) (requiring the city and state to end sheltered work at those sheltered workshops and provide integrated supported employment services to individuals with disabilities who currently or recently worked in them). [↑](#footnote-ref-5)
6. See § 511(a)(3)(B)(i). [↑](#footnote-ref-6)
7. See § 511(a)(3)(B)(ii). [↑](#footnote-ref-7)
8. See § 511(a)(4). [↑](#footnote-ref-8)
9. See § 511(a)(3)(B)(i). [↑](#footnote-ref-9)
10. Letter from Thomas E. Perez, Assistant Attorney General, to John Kroger, Attorney General, June 29, 2012, at 15-16. [↑](#footnote-ref-10)
11. See TASH, Non-Legislative Changes to Improve Integrated Employment Outcomes 6-7 (Feb. 21, 2013). [↑](#footnote-ref-11)
12. § 511(a)(3)(C). [↑](#footnote-ref-12)
13. See, e.g., 34 C.F.R. 361.37. [↑](#footnote-ref-13)
14. See § 511(a)(3)(B)(ii)(III). [↑](#footnote-ref-14)
15. See § 511(a)(3)(B)(ii)(IV). [↑](#footnote-ref-15)
16. See TASH, *supra* note 10, at 6-7 (of all individuals with disabilities who were initially found eligible for VR services and whose cases were closed in 2011, 48% had their cases closed unsuccessfully after a determination that they would not obtain an integrated employment outcome). [↑](#footnote-ref-16)
17. See § 511(a)(4). [↑](#footnote-ref-17)
18. See § 511(a)(4)(A). [↑](#footnote-ref-18)
19. See § 511(a)(4)(B). [↑](#footnote-ref-19)
20. See *The Case Against the Section 14(c) Subminimum Wage Program*, *supra* note 2, at 4-5. [↑](#footnote-ref-20)
21. Gary R. Bond, *Supported Employment: Evidence for an Evidence-Based Practice*, 27 Psychiatric Rehab. J. 345, 353 (2004). [↑](#footnote-ref-21)
22. Stephen T. Murphy & Patricia M. Rogan, Closing the Shop: Conversion from Sheltered to Integrated Work 20 (1995). [↑](#footnote-ref-22)
23. See Letter from Thomas E. Perez to Mary Ann Carroll, *supra* note 4, at 12. [↑](#footnote-ref-23)
24. See § 511(a)(4). [↑](#footnote-ref-24)
25. 527 U.S. 581 (1999). [↑](#footnote-ref-25)
26. See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, available at [http://www.ada.gov/olmstead/q&a\_olmstead.htm](http://www.ada.gov/olmstead/q%26a_olmstead.htm). [↑](#footnote-ref-26)
27. See Complaint in Intervention of the United States of America, Lane v. Kitzhaber, No. 3:12-cv-00138-ST (intervention granted May 22, 2013). [↑](#footnote-ref-27)
28. See Interim Settlement Agreement, United States v. Rhode Island, *supra* note 4. [↑](#footnote-ref-28)
29. See *id.* (requiring the closure of a sheltered workshop program at a Providence High School, and requiring integrated employment services for those who had been served by that program). [↑](#footnote-ref-29)